



5:19 pm, 6/22/20

Margaret Botkins
Clerk of Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

HIP Lending Group LLC,

Plaintiff,

v.

Goalz Restaurant Group LLC, et al.,

Defendants.

No. CV-20-00544-PHX-DJH

ORDER

Plaintiff filed their Complaint (Doc. 1) and accompanying Motion for the Appointment of Receiver (Doc. 4) on March 16, 2020. Defendants filed a Response (Doc. 28) and Plaintiff filed a Reply (Doc. 28). On May 12, 2020, the Court held a hearing on the Motion ("Motion Hearing"). (Doc. 34). At the conclusion of the Motion Hearing, the Court took the matter under advisement. Shortly thereafter, the Court granted the Motion and stated that a written order would follow.¹ (*Id.*) This is that Order.²

¹ Defendants have filed a Motion for Reconsideration of this Court's Order granting HIP Lending's Motion for Appointment of Receiver. (Doc. 39). Therein, Defendants provide, "HIP [Lending's] failure to propose appropriate terms for a receiver on an interim or permanent basis, its proposal to appoint very expensive and overwhelmingly costly receivers, together with the changed circumstances since the filing of the motion warrant a reconsideration and denial" of HIP Lending's Motion. (*Id.* at 3). Much of Defendants' Motion simply repeats arguments they made in their Response to HIP Lending's Motion and at the Motion Hearing. Additionally, the evidence regarding Defendants' "changed circumstances" was previously detailed in the Joint Supplemental Report (Doc. 36) that the Court directed the parties to file. In other words, Defendants' Motion asks this Court to merely rethink its Order, which is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988). Accordingly, the Court will deny Defendants' Motion (Doc. 39).

² The Court notes that HIP Lending has filed a Motion to Dismiss Defendants' Counterclaims (Doc. 35), which is not yet fully briefed. The Court will not address that

1 **I. BACKGROUND**

2 Plaintiff HIP Lending Group LLC (“HIP Lending”) is an Arizona limited liability
3 company and Defendants are part of a corporate family of entities that operate quick service
4 restaurants in Wyoming, Colorado, Illinois, Kentucky, Florida, Georgia, North Carolina,
5 South Carolina, and Louisiana. (Doc. 1 ¶¶ 1, 19). These restaurants are operated pursuant
6 to franchise agreements with Dog Haus, Church’s Chicken, Dairy Queen, and Captain D’s.
7 (*Id.* ¶ 19). Defendant Goalz Restaurant Group, LLC (“GRG”) owns membership interests,
8 either directly or indirectly, in Defendants Goalz CD Pooler GA; Goalz Dairy Denver NC,
9 LLC; Goalz Dairy Ft Pierce FL, LLC; Goalz DH Springs CO, LLC; Goalz DH Georgetown
10 KY 111, LLC; Goalz DH IL 107, LLC; Goalz DH IL 109; Goalz DH Slidell LA 112, LLC;
11 Goalz Restaurant Group COWY, LLC; Goalz Restaurant Group FLA, LLC; Goalz
12 Restaurant Group KTY, LLC; and Goalz Restaurant Group NCSC, LLC (collectively the
13 “Subsidiary LLCs”).³ (*Id.* ¶¶ 20-27). Additionally, GRG operates as the management
14 company for the Subsidiary LLCs in the operation of the respective quick service restaurant
15 owned by the particular Subsidiary LLC. (*Id.* ¶ 21). Defendant Mr. Shawn Eby (“Mr.
16 Eby”) is the Chief Executive officer of GRG and each Subsidiary LLC. (*Id.* ¶ 28).

17 The crux of this lawsuit is that HIP Lending loaned GRG approximately
18 \$3,000,000.00 and it has failed to make the required payments. (*Id.* ¶ 53). In September
19 2018, the parties entered into a loan agreement (“Loan Agreement”) through which HIP
20 Lending loaned GRG \$800,000.00 through a series of advances. (*Id.* ¶ 29; Doc. 27-1⁴ at
21 10). The loan is evidenced by the Promissory Note dated September 4, 2018. (Doc. 27-1
22 at 36-38). In connection with the Loan Agreement, GRG granted a security interest in the

23

24 Motion in this Order.

25 ³ Exhibit A (Doc. 1-3) to the Complaint is a GRG business organization chart that
26 depicts the corporate structure and relationship between the corporate Defendants and
27 GRG.

28 ⁴ HIP Lending referenced the Loan Agreement in its Complaint and attempted to
attach a copy of it to the Complaint. However, HIP Lending inadvertently attached an
unexecuted copy of the Loan Agreement as Exhibit B to the Complaint. (Doc. 1-4).
Accordingly, HIP Lending filed a Notice of Errata and attached an executed copy of the
Loan Agreement. (Doc. 27).

1 following assets whether then owned or subsequently acquired or created:

2 All Accounts, Chattel Paper, Goods (including all Inventory, Equipment and
3 Fixtures), Documents, Instruments, General Intangibles (including Payment
4 Intangibles), Investment Property, Letter-of-Credit Rights, Supporting
5 Obligations, Commercial Tort Claims, Other Property, and Borrower's
6 limited liability membership interests in its Subsidiaries; all Proceeds and
7 products of all of the foregoing (including Proceeds of any insurance policies
8 and claims against third parties for loss or any destruction of any of the
9 foregoing); and all Records relating to any of the foregoing.

10 (the "Collateral") (Doc. 1 ¶ 30; Doc. 27-1 at 12-13). On September 10, 2018, HIP Lending
11 filed UCC-1 Financing Statements to perfect its security interest in the Collateral. (Doc. 1
12 ¶ 31; Doc. 1-5). Additionally, the Subsidiary LLCs guaranteed the Loan Agreement
13 obligations. (Doc. 1 ¶ 32; Doc. 27-1 at 5, 20-23, 26-28, 30).

14 In March 2019, the Loan Agreement was amended ("Amended Loan Agreement")
15 to facilitate an additional \$1,000,000.00 loan from HIP Lending to GRG. (Doc. 1 ¶ 33;
16 Doc. 27-2 at 10). The additional loan is evidenced by the Secured Promissory Note dated
17 March 14, 2019. (Doc. 27-2 at 42-44). Similar to the Loan Agreement, the Amended Loan
18 Agreement granted HIP Lending a security interest in the Collateral, and HIP Lending
19 again filed UCC-1 Financing Statements to perfect its security interest in the Collateral.
20 (Doc. 1 ¶ 34; Doc. 1-5; Doc. 27-2 at 13). As with the Loan Agreement, the Subsidiary
21 LLCs guaranteed the Amended Loan Agreement obligations. (Doc. 1 ¶ 35; Doc. 27-2 at
22 5, 21-24, 28-30, 32).

23 In April 2019, the Amended Loan Agreement was amended for a second time
24 ("Second Amended Loan Agreement") to facilitate an additional loan from HIP Lending
25 to GRG, which raised the total amount of the loan to \$3,000,000.00. (Doc. 1 ¶ 36; Doc.
26 27-3 at 10). The additional loan is evidenced by the Secured Promissory Note dated April
27 29, 2019. (Doc. 27-3 at 41-43). Similar to the Loan Agreement and the Amended Loan
28 Agreement, the Second Amended Loan Agreement granted HIP Lending a security interest
in the Collateral, and HIP Lending again filed UCC-1 Financing Statements to perfect its
security interest in the Collateral. (Doc. 1 ¶ 37; Doc. 1-5; Doc. 27-3 at 12-13). As with

1 the Loan Agreement and the Amended Loan Agreement, the Subsidiary LLCs guaranteed
2 the Second Amended Loan Agreement obligations. (Doc. 1 ¶ 38; Doc. 27-3 at 5, 20-23,
3 27-29, 31). The Second Amended Loan Agreement was to be repaid in thirty-six (36)
4 monthly payments of accrued interest and principal beginning on January 1, 2020. (Doc. 1
5 ¶ 40). Each monthly payment was due on the first of each month until paid in full. (*Id.*)
6 The entire principal balance of the loan was due with all interest, fees, and other charges
7 on January 1, 2023, if not otherwise accelerated. (*Id.*)

8 Pursuant to the Second Amended Loan Agreement, in the event of GRG's default,
9 GRG shall have five (5) business days following the notice of default to cure such default.
10 (Doc. 27-3 at 17). "Events of Default" includes, among other things, a failure to make the
11 required payments. (*Id.* at 17-18). Additionally, if GRG fails to cure the Event of Default,
12 HIP Lending is entitled to accelerate and declare immediately due and payable all amounts
13 due under the Second Amended Loan Agreement. (*Id.* at 19). The Second Amended Loan
14 Agreement also provides that upon an Event of Default, HIP Lending is entitled to seek the
15 appointment of a receiver. (*Id.*) Specifically, the Second Amended Loan Agreement
16 provides, in relevant part:

17 Upon or after the occurrence of an Event of Default . . . [HIP Lending] may,
18 in its discretion, petition for and obtain the appointment of a receiver to take
19 possession of any or all of the Collateral and to operate any [GRG and
20 Subsidiary LLCs] business and to exercise such rights and powers as the
21 court appointing such receiver shall confer upon such receiver, [GRG and
22 Subsidiary LLCs] hereby consenting. . . .

23 (*Id.*)

24 On March 2, 2020, HIP Lending notified GRG that it was in default for failing to
25 make the required payments under the Second Amended Loan Agreement and provided an
26 opportunity for GRG to cure the default. (Doc. 1 ¶ 54). Despite the notice and opportunity
27 to cure, GRG failed to cure the default. (*Id.* ¶ 56). On March 10, 2020, HIP Lending
28 notified GRG that it was accelerating the loan and demanded payment for the total amounts
due under the Second Amended Loan Agreement. (*Id.* ¶ 57).

As of March 9, 2020, GRG and the Subsidiary LLCs were obligated to HIP Lending
in the amount of \$3,377,869.48, which represents outstanding principal and accrued

1 interest. (*Id.*) In addition, HIP Lending asserts that GRG and the Subsidiary LLCs are
 2 delinquent in payments to other vendors for certain expenses incurred in the daily operation
 3 of the restaurants and, in addition to the amount owed to HIP Lending, have outstanding
 4 payables in excess of \$1,000,000.00. (*Id.* ¶¶ 42-52). Specifically, HIP Lending asserts that
 5 GRG has received disconnect notices from various utilities for non-payment and has
 6 received default notices from several landlords.⁵ Additionally, HIP Lending alleges that
 7 Defendants are in default of several of the franchise agreements. (*Id.*)

8 On March 16, 2020, HIP Lending filed its Complaint, alleging the following claims
 9 for relief: (1) Breach of Contract, (2) Unjust Enrichment, (3) Breach of Implied Covenant
 10 of Good Faith and Fair Dealing, and (4) Breach of Guaranty. (Doc. 1). Defendants filed
 11 their Answer on April 22, 2020. (Doc. 25). Defendants also filed a Motion to Dismiss
 12 (Doc. 24), which the Court previously denied. (Doc. 33). HIP Lending filed the pending
 13 Motion for the Appointment of Receiver (Doc. 4). The Court held a hearing on the Motion
 14 on May 12, 2020 and granted the Motion.

15 II. LEGAL STANDARD

16 The appointment of a receiver in a diversity case is governed by federal law and
 17 federal equitable principles. *See New York Life Ins. Co. v. Watt West Inv. Corp.*, 755 F.
 18 Supp. 287, 290–92 (E.D. Cal. 1991). “Under federal law, appointing a ‘receiver is an
 19 extraordinary equitable remedy,’ which should be applied with caution.” *Canada Life*
 20 *Assur. Co. v. LaPeter*, 563 F.3d 837, 844 (9th Cir. 2009) (quoting *Aviation Supply Corp.*
 21 *v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993)). In federal court, a motion
 22 to appoint a receiver is governed by Federal Rule of Civil Procedure (“Rule”) 66, which
 23 provides that “the practice in administering an estate by a receiver or a similar court-

24 ⁵ Defendants provide that they received a Small Business Administration (“SBA”) loan pursuant to the Payroll Protection Program (“PPP”) provision of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (“CARES Act”). (Doc. 39 at 4). As a result of that loan, Defendants provide they “are [now] current on rent obligations with all landlords.” (*Id.*) While Defendants claim that all of these funds will be “forgiven,” Defendants are not in a position to make such guarantees. Whether all or part of the PPP loan is forgiven is a decision by the U.S. Treasury Department and SBA, not Defendants. In other words, it is not a forgone conclusion that the PPP loan will be forgiven. However, for the purposes of this Order, the Court will assume that Defendants are current on all rent obligations.

1 appointed officer must accord with the historical practice in federal courts or with a local
2 rule.” Requiring courts to adhere to the “normative standard” of historical practice in
3 federal courts ensures uniform appointment of receivers. *Canada Life*, 563 F.3d at 842.

4 Although historical practice has not yielded a precise formula for the appointment
5 of a receiver, court decisions have created a group of factors that a court should consider
6 when deciding whether to appoint a receiver. *Id.* at 844. Factors that courts consider
7 include:

8 (1) whether the party seeking the appointment has a valid claim; (2) whether
9 there is fraudulent conduct or the probability of fraudulent conduct, by the
10 defendant; (3) whether the property is in imminent danger of being lost,
11 concealed, injured, diminished in value, or squandered; (4) whether legal
12 remedies are inadequate; (5) whether the harm to plaintiff by denial of the
13 appointment would outweigh injury to the party opposing appointment; (6)
14 the plaintiff’s probable success in the action and the possibility of irreparable
15 injury to plaintiff’s interest in the property; and, (7) whether the plaintiff’s
16 interests sought to be protected will in fact be well-served by receivership.

17 *Id.* (internal quotation and citation omitted).

18 The Ninth Circuit has also previously applied factors such as “whether the defendant
19 was of doubtful financial standing” and “whether the property was of insufficient value to
20 insure payment.” *Canada Life*, 563 F.3d at 844. Evidence of only these two “previously
21 applied” factors may be sufficient to appoint a receiver to collect rents or other revenue
22 from the subject property, but they alone are not sufficient to vest the receiver with
23 managerial powers; “something more” is also required for appointment of a receiver with
24 the added power to manage the property. *Id.* at 845 (quoting *View Crest*, 281 F.2d at 847).
25 This difference is material, because the grant of managerial powers, unlike the authority to
26 collect rents, effectively divests the property owner of rights traditionally exercised by an
27 owner. See *Sterling Sav. Bank v. Citadel Dev. Co, Inc.*, 656 F. Supp. 2d 1248, 1261 (D.
28 Or. 2009). The additional requirement for managerial receivers may be evidence indicating
the risk of economic waste, foreclosure delays, or any other factor that compels
appointment of a receiver. *Canada Life*, 563 F.3d at 845 (citing *View Crest*, 281 F.2d at
847). Ultimately, the court has broad discretion in determining whether to appoint a

1 receiver. *See, e.g., Canada Life*, 563 F.3d at 845.

2 **III. DISCUSSION**

3 HIP Lending requests a receiver with broad managerial powers. (Doc. 4-3). HIP
4 Lending argues that the Court should appoint a receiver because: (1) GRG and the
5 Subsidiary LLCs consented to the appointment of a receiver in the Second Amended Loan
6 Agreement, (2) GRG and the Subsidiary LLCs are in a dubious financial position, and (3)
7 the traditional equitable factors support the appointment of a receiver. (Doc. 4).
8 Defendants, however, argue that a receivership is inappropriate because: (1) “[HIP
9 Lending’s] principal is a fifteen percent (15%) owner of the Defendants”⁶ and therefore
10 HIP Lending has a conflict of interest, and (2) the traditional factors for evaluating the
11 propriety of receivership do not favor the appointment of a receiver.⁷ (Doc. 26 at 2).

12 **A. The Effect of Contractual Consent to Appoint a Receiver**

13 While consent is a factor that commands great weight, it alone is not dispositive of

14
15 ⁶ Defendants have failed to offer evidence of a conflict of interest, in part, because as
16 discussed at the Motion Hearing, HIP Lending is not a fifteen percent owner of Defendants.
17 Rather, RCH-Goalz Holdings, LLC holds a fifteen percent interest in Defendants. (Doc.
18 26 at 4). RCH-Goalz Holding is managed by Hannay Investment Properties, Inc. and
19 owned by RCH Investment Company, LLC. RCH Investment Company is also managed
20 by Hannay Investment Properties and owned by the Robert Craig Hannay Irrevocable Trust
21 and the R Craig Hannay Trust.

22 Hannay Investment Properties has one shareholder, Mr. R. Craig Hannay (“Mr.
23 Hannay”), who is also a Director, the President, and the CEO of Hannay Investment
24 Properties. Additionally, John Reid Bracken is a Director and the Vice-President, Mary C.
25 Hislop is a Director and the Treasurer, and Tamara A. Hartrick is the Secretary of Hannay
26 Investment Properties.

27 HIP Lending is owned by HIPCO Office Investments, LLC and the Hannay Family
28 Trust (Doc. 2) and is also managed by Hannay Investments Properties. HIPCO Office
Investments is also managed by Hannay Investments Properties and owned by RCH
Investment Company, RJH Investments LLP, and the Carrie Russel Trust.

In other words, HIP Lending and RCH-Goalz are both managed by Hannay
Investment Properties; however, their ownership structures are different, although there is
clearly some overlap. Moreover, HIP Lending argued, and Defendants did not dispute,
that the loan agreements at issue here were all arm’s length transactions. Accordingly, the
Court finds that while the ownership of HIP Lending and RCH-Goalz Holdings is
convoluted and Mr. Hannay clearly has a prominent role in both, Defendants have not put
forth evidence to support their “conflict of interest” argument.

⁷ Defendants also argue that HIP Lending’s claims are barred by the statute of frauds,
and therefore there are serious questions regarding the merits of HIP Lending’s claims.
(Doc. 26 at 1). The Court already denied Defendant’s Motion to Dismiss premised on the
same statute of frauds argument. (Doc. 33). Accordingly, the Court will not address that
argument again in this Order.

1 whether to appoint a receiver. *Sterling Sav. Bank v. Citadel Dev. Co., Inc.*, 656 F. Supp.
2 2d 1248, 1260-61 (D. Or. 2009) (collecting authorities and concluding that contractual
3 consent is not automatically dispositive of federal receivership analysis, but it is an
4 equitable factor that commands great weight). Additionally, courts have distinguished
5 between the type and scope of the consent. *Id.* (“Consent to the mere *application* to a court
6 to appoint a receiver may be materially different from consent to the *actual appointment*
7 of a receiver.”) (emphasis added). Defendants have not only consented to the application
8 to appoint a receiver but have also consented to HIP Lending “obtain[ing] the appointment
9 of a receiver” (Doc. 27-3 at 19). Moreover, Defendants consented to the “appointment
10 of a receiver to take *possession* of any or all of the Collateral and to *operate* any [GRG and
11 Subsidiary LLCs] business. . . .” *Id.* In other words, Defendants have consented to the
12 appointment of a receiver with broad managerial powers. Additionally, Defendants have
13 not argued that the consent provision of the Second Amended Loan Agreement is invalid
14 or otherwise unenforceable. Thus, Defendants’ alleged consent to the appointment of a
15 receiver greatly weighs in HIP Lending’s favor, but it does not require appointment. *See*
16 *Sterling Sav. Bank*, 656 F. Supp. 2d at 1261 (noting consent “commands great weight” and
17 should be considered “in addition to weighing the federal receivership factors espoused in
18 *Canada Life*”).

19 **B. Weighing the *Canada Life* Receivership Factors**

20 The Court’s analysis of the *Canada Life* receivership factors begins with the two
21 “previously applied” factors. The first “previously applied” factor is whether Defendants
22 are of doubtful financial standing. *Canada Life*, 563 F.3d at 844. In their briefing and
23 during the Motion Hearing, HIP Lending provided evidence—which Defendants did not
24 dispute—that Defendants are in default from third-party vendors that are unrelated to HIP
25 Lending. (Doc. 1-12; Doc. 1-13; Doc. 28-2). Specifically, several of the Subsidiary LLCs
26 are franchisees that, pursuant to the franchise agreements, are in default, and in some cases,
27 termination of the franchise agreement may be imminent. (Doc. 1-10; Doc. 1-11).
28 Moreover, Defendants do not dispute that they have failed to make the required payments

1 under the Second Amended Loan Agreement. Defendants concede that they have been
2 juggling payables and have struggled to pay daily operational expenses. While the Court
3 appreciates the current Coronavirus pandemic has certainly worsened Defendants'
4 financial position, the Court notes that Defendants' financial instability began long before
5 the pandemic took hold. Defendants appear unable to manage their mounting debts in a
6 way that protects all of the creditors, including HIP Lending.

7 The parties notified the Court that Defendants are in the process of selling several
8 Subsidiary LLCs "[e]ssentially, in exchange for forgiveness of back rent, late charges,
9 interest, fees, and all liability (including guaranties) under leases at those locations"
10 (Doc. 36 at 5). Defendants estimate that this transaction would alleviate about \$400,000.00
11 in debt from GRG's books. (*Id.*) Defendants also provide that they are in negotiations to
12 sell three other Subsidiary LLCs and "[i]t is anticipated that these sales would be for cash
13 rather than forgiveness of landlord obligations."⁸ (*Id.*; Doc. 39 at 5). Additionally,
14 Defendants have received a \$687,900.00 Small Business Administration loan⁹ pursuant to
15 the Payroll Protection Program ("PPP") provision of the Coronavirus Aid, Relief, and
16 Economic Security Act of 2020 ("CARES Act").¹⁰ (Doc. 36 at 2). While the Court
17 recognizes that these transactions may alleviate some of the financial hardship Defendants
18 are experiencing, the Court does not find that they would put Defendants in a position that
19 would weigh against the appointment of a receiver. In conclusion, the Court finds that
20 evidence put forth supports the inference that Defendants are of doubtful financial standing.
21 Thus, this factor weighs in favor of appointing a receiver.

22 The second "previously applied" factor is whether the Collateral's value is

23 ⁸ Defendants provide that the sale of the three restaurants reduces the outstanding rent
24 obligations by approximately \$556,162.20. (Doc. 39 at 5).

25 ⁹ Defendants provide in their Motion for Reconsideration that they received a PPP
26 loan of \$1,124,000.00; however, this is inaccurate. (Doc. 39 at 2). As noted in the Joint
27 Status Report, the PPP loan received included approximately \$436,100.00 that was
28 allocated to an entity that is not a party to this litigation or subject to the receivership. (Doc.
36 at 2). Accordingly, only \$687,900.00 was allocated to Defendants.

¹⁰ As previously discussed, despite Defendants' arguments to the contrary, the PPP
loan is not automatically forgiven, and therefore, the Court will not treat it as so in this
Order.

1 insufficient for the debt it secures. *Canada Life*, 563 F.3d at 844. HIP Lending has
2 submitted evidence that as of March 9, 2020, Defendants owe a principal balance of
3 \$3,000,000.00, as well as \$377,869.48 in interest. (Doc. 4-1 at 7). Moreover, Defendants
4 have conceded that they have not made any payments on the outstanding loan amount.
5 Defendants argue that the total value of the Collateral is \$9,200,000.00; however, the
6 authenticity of the “evidence” (Doc. 26-1) supporting Defendants’ valuation is in dispute.
7 (*Compare* Doc. 26 at 4, *with* Doc. 28-2 at 2-3). Furthermore, Defendants have not provided
8 sufficient information to allow the Court to weigh the credibility of this “evidence” and the
9 facts and figures contained therein. Additionally, in addition to the outstanding loan to
10 HIP Lending, the parties provide that as of May 15, 2020, Defendants’ “records reflect
11 payables in excess of \$2,000,000 relating to their operations[,] [m]any of [which] are in
12 excess of sixty days overdue.” (Doc. 36 at 4). In other words, Defendants’ debt at least
13 exceeds \$5,000,000.00, and, given that default interest continues to accrue daily on the
14 balance due on the loans, is growing by the day. Moreover, Defendants provided no
15 assurances they will soon be in a position to fully repay the amounts owed. Thus, although
16 the record before the Court does not support a conclusive finding that the Collateral’s value
17 is insufficient for the debt it secures, HIP Lending has offered evidence that indicates that
18 the security is likely inadequate. Accordingly, the Court finds this factor favors the
19 appointment of a receiver.

20 Moving to the *Canada Life* enumerated factors, the Court will first consider whether
21 HIP Lending has a valid claim. The Court has not had the benefit of a trial or of hearing all
22 the evidence that bears on HIP Lending’s claims; however, HIP Lending has submitted
23 evidence that Defendants GRG have defaulted on the Second Amended Loan Agreement
24 with an outstanding balance, including interest, of over \$3,000,000.00. (Doc. 4-1 at 7).
25 Moreover, Defendants have not offered any evidence to dispute the allegation of default
26 and conceded at the Motion Hearing that they had yet to make any payments on the
27 outstanding loan. Thus, HIP Lending has presented evidence sufficient to prove the
28 validity of its claims, and this factor weighs in favor of appointing a receiver.

1 The second enumerated factor is whether HIP Lending has presented evidence of
2 “fraudulent conduct or the probability of fraudulent conduct, by the defendant.” *Canada*
3 *Life*, 563 F.3d at 844. HIP Lending has not alleged any fraud or misrepresentation by
4 Defendants. In fact, HIP Lending conceded during the Motion Hearing that, while there is
5 a myriad of management issues, at this time there are no allegations that any of those
6 management issue rise to the level of fraud. Therefore, this factor weighs against the
7 appointment of a receiver at the present time.

8 The third enumerated factor is whether HIP Lending has submitted sufficient
9 evidence to show that “the property is in imminent danger of being lost, concealed, injured,
10 diminished in value, or squandered.” *Id.* HIP Lending has provided substantial evidence
11 indicating that Defendants are delinquent in paying substantial debts incurred by daily
12 operations, such as utility payments.¹¹ If the utilities are terminated, those restaurants will
13 cease to operate and will be unable to generate revenue, further decreasing the value of the
14 Collateral. Moreover, as much of the value of the Collateral is intimately tied to continued
15 operation under the franchise agreements, the evidence that several of the Subsidiary LLCs
16 are in default of their franchise agreements¹² indicates that the Collateral is in imminent
17 danger of being diminished. *See U.S. Bank Nat’l Ass’n v. Nesbitt Bellevue Prop. LLC*, 866
18 F. Supp. 2d 247, 250–51 (S.D.N.Y. 2012) (allowing the appointment of a receiver because
19 the properties at issue faced an “inexorable” diminution in value based on the imminent
20 loss of a franchise license). Accordingly, this factor weighs in favor of appointing a
21 receiver.

22
23 ¹¹ While Defendants provide that PPP loans can be used for utility obligations, they
24 fail to mention whether they are in fact current on their utility obligations. (Doc. 39 at 2).

25 ¹² In August 2019, one of the Subsidiary LLCs that operates a Church’s Chicken
26 pursuant to a franchise agreement narrowly avoided termination of the franchise agreement
27 by entering into a promissory note with the franchisor. (Doc. 1 ¶ 45; Doc. 1-9). A provision
28 of that promissory note provides that any default thereunder is a default upon all franchise
 agreements with the franchisor. In early March 2020, GRG failed to make the required
 payments under the promissory note and is therefore in default. (Doc. 1-10). In other
 words, pursuant to the terms of the promissory note, all of the Subsidiary LLCs operating
 pursuant to a Church’s Chicken franchise agreement are in danger of their franchise
 agreements being terminated.

1 The fourth enumerated *Canada Life* factor is whether HIP Lending’s legal remedy,
2 foreclosure, which is the typical remedy for nonpayment and breach of loan obligations, is
3 inadequate. *Canada Life*, 563 F.3d at 844. Although GRG manages all of the Subsidiary
4 LLCs, each Subsidiary LLC is effectively a single quick service restaurant—located in a
5 multitude of states, including North Carolina, South Carolina, Georgia, Wyoming, and
6 Illinois—that operates pursuant to a franchise agreement. Thus, foreclosure is neither
7 simple nor quick enough to protect the Collateral from serious diminution. Accordingly,
8 HIP Lending argues that its legal remedies are inadequate because, absent the appointment
9 of a receiver to manage the Collateral and prevent its value from being adversely affected,
10 the Collateral will likely be inadequate to secure the value of the loan. The evidence
11 indicates that it is unlikely that Defendants might soon become able to fully repay the
12 amounts owed on their loan. Moreover, as the Court has already noted, given the
13 deteriorating nature¹³ of the Defendants’ financial situation, the threatened termination of
14 franchise agreements, and looming utility disconnections, the Collateral is in imminent
15 danger of being diminished. Accordingly, the Court finds that given the tenuous position
16 of the collateral and time-consuming nature of foreclosure given the fact that the restaurants
17 operated by the Subsidiary LLCs are located in several different states, HIP Lending’s legal
18 remedies are inadequate. Accordingly, this factor weighs in favor of appointing a receiver.

19 The fifth enumerated *Canada Life* factor is “whether the harm to plaintiff by denial
20 of the appointment would outweigh injury to the party opposing appointment.” *Canada*
21 *Life*, 563 F.3d at 844. HIP Lending argues that “Defendants are staring into the abyss with

22
23 ¹³ Defendants argue that as of late their “performance has been outstandingly better
24 than during the coronavirus shutdowns in early March through mid to-late April. . . . These
25 are wholesale improvements in performance, 52.44% to be exact.” (Doc. 39 at 7).
26 Defendants further provide “the boon [sic] of the CARES’s Act PPP loan, all of which will
27 be forgiven, is expected to ignite the Defendants’ recovery and ability to pay HIP
28 [Lending].” (*Id.*) While the Court appreciates that there appears to be some improvements,
Defendants appear to fail to recognize that the 52.44 percent increase in only an increase
in *revenue*; it does not account for expenses. Moreover, it is calculated using the lowest
performing week during the deepest impact of the pandemic at each location as a baseline.
(Doc. 36 at 3). Additionally, Defendants are asking this Court to rely on their
“expectations” without providing a plan for financial recovery. Accordingly, despite
Defendants’ contentions, there is little evidence to suggest that Defendants are in a stable
financial position.

1 landlords, franchisors, and other creditors starting the process to collect on their claims[.]”
2 and “the appointment of a receiver who will take possession of the Collateral and protect
3 it from forfeiture and dissipation will actually provide value to the Defendants.” (Doc. 4
4 at 10). Defendants, however, contend that they “may be headed over a cliff, like most
5 restaurants these days [and] [t]he last thing they need is someone who has never set foot
6 behind the counter in a franchise telling them how to run things.” (Doc. 26 at 9-10).
7 Defendants further argued at the Motion hearing that, left to their own devices and based
8 upon Mr. Eby’s “entrepreneurship,” they can stabilize their finances. While the Court
9 appreciates that Mr. Eby is an entrepreneur, Defendants failed to provide any evidence that
10 they have a strategy or plan to regain control of their financial situation. Rather, they
11 appear to rely on an ad hoc strategy of hoping they will have a “good weekend” that will
12 cause a spike in revenue that will be sufficient to catch up on their outstanding obligations.
13 This is an inadequate business plan given Defendants’ current financial situation. A receiver
14 with experience in turnaround consulting will likely have the skills necessary, and a more
15 coherent strategy, for regaining control of Defendants’ finances. In light of Defendants’
16 lack of coherent strategy and the deteriorating nature of their financial situation, the Court
17 finds that the harm to HIP Lending by denying of the appointment outweighs the injury to
18 Defendants. Therefore, this factor weighs in favor of appointing a receiver.

19 The sixth enumerated factor in *Canada Life* is “the plaintiff’s probable success in
20 the action and the possibility of irreparable injury to plaintiff’s interest in the property.”
21 *Canada Life*, 563 F.3d at 844. As previously discussed, Defendants do not dispute that
22 they are in default. Accordingly, based on the evidence before the Court, HIP Lending’s
23 probability of success on the merits of the claims alleged in the Complaint appears high.
24 Moreover, as previously discussed, the Collateral is in imminent danger of being
25 diminished. Accordingly, this factor weighs in favor of appointing a receiver.

26 The seventh and final enumerated factor in *Canada Life* is whether HIP Lending
27 has submitted sufficient evidence to show that its “interests sought to be protected will in
28 fact be well-served by receivership.” *Canada Life*, 563 F.3d at 844. Appointing a receiver

1 will allow an independent entity to manage the Collateral and review expenses, including
2 salaries,¹⁴ while the claims are adjudicated, which is in HIP Lending's interest. Thus, this
3 factor weighs in favor of appointing a receiver.

4 After considering each of the enumerated and the "previously applied" *Canada Life*
5 factors individually and weighing them in the aggregate and considering Defendants'
6 consent to a receiver in the Second Amended Loan Agreement, the Court concludes that
7 HIP Lending has shown that appointment of a receiver is necessary and appropriate.
8 Moreover, given the circumstances and the fact that Defendants consented to a managerial
9 receivership, the Court finds that a managerial receivership is necessary. Therefore, HIP
10 Lending's Motion for the Appointment of Receiver is granted.

11 **C. Proposed Receiver**

12 HIP Lending initially proposed the appointment of "GlassRatner Advisory &
13 Capital Group, LLC, by and through Bill Hughes" as the receiver. (Doc. 4-3). HIP
14 Lending further provided that Mr. Hughes is "a C.P.A. with considerable experience as a
15 receiver, chief restructuring officer, and chapter 11 trustee." (Doc. 4 at 12). Defendants,
16 however, contend that Mr. Hughes is an inappropriate receiver because he has no
17 experience with franchises or restaurants. (Doc. 26 at 9). At the Motion hearing, the Court
18 expressed concerns with proposal of Mr. Hughes and GlassRatner due to the lack of
19 experience in the restaurant industry. Accordingly, the Court permitted HIP Lending to
20 provide supplemental support for GlassRatner and Mr. Hughes, which it did provide.
21 Additionally, the Court instructed the parties to confer in good faith and jointly provide a
22 proposed receiver. However, if the parties were unable to agree on a proposed receiver,
23

24 ¹⁴ HIP Lending alleges that "in February 2020, Defendants, at Mr. Eby's direction,
25 increased Mr. Eby's wife's salary from \$50,000 to \$75,000 despite consistent shortfalls in
26 making payroll and payment of other expenses." (Doc. 4 at 6). At the Motion Hearing,
27 Defendants countered that the increase in salary was because Mr. Eby's wife took on more
28 responsibility. The Court does not find that the increase in salary is necessarily
inappropriate; however, the Court is skeptical that an increase in compensation in February
2020 was prudent when on March 5, 2020, Defendants received a Notice of Default from
one of its franchisors for failing to make the required payments under a promissory note.
(Doc. 1-10 at 2). In other words, the Court finds an independent entity will be beneficial
to review Defendants' expenses.

1 each party could provide the Court with one proposed receiver. Plaintiff complied with
2 the Court's direction and nominated Ankura Consulting Group, LLC ("Ankura"), by and
3 through, its Senior Managing Director P. Gregg. (Doc. 38). Defendants, however, failed
4 to propose a receiver.¹⁵

5 HIP Lending provides that GlassRatner has substantial experience with franchised
6 restaurants and has assisted franchisors, franchisees, and creditors of franchisees in a
7 variety of matters and roles. (Doc. 37 at 2). While Mr. Hughes "has not served as a receiver
8 for restaurants"; HIP Lending contends that "numerous other individuals within
9 [GlassRatner] are qualified to serve" as receiver. (*Id.*) Specifically, in its supplemental
10 support, HIP Lending provides that Mr. Joseph Pegnia, a Senior Managing Director at
11 GlassRatner, has restaurant industry experience with numerous franchisees and
12 franchisors, including the sale of restaurants. (Doc. 37 at 3). Additionally, HIP Lending
13 provides that Mr. Pegnia has substantial experience overseeing the operations of more than
14 150 franchised restaurants. (*Id.*) The Court has considered all proposed receiver and finds
15 that the appointment of Mr. Pegnia is best suited as a receiver here and will likely do more
16 good than harm. Mr. Pegnia has impressive professional credentials and experience in
17 areas relevant to Defendants' business, including restaurants and franchises. Moreover,
18 the Court is not persuaded that "Defendants' financial performance since the depths of the
19 coronavirus-related shutdowns have been nothing short of remarkable." (Doc. 39 at 4).
20 The record shows that Defendants have not managed the restaurants so as to protect HIP
21 Lending's interests. Insofar as the receiver requires any specialized knowledge that Mr.
22 Eby alone possesses, the receiver can solicit input from Mr. Eby and the Court expects Mr.
23 Eby to be cooperative.

24 **IV. CONCLUSION**

25 To be sure, the appointment of a receiver is an "extraordinary equitable remedy . . ."

26
27 ¹⁵ Defendants maintain that they are in the best position to operate and manage the
28 businesses and expressed their dissatisfaction with HIP Lending's proposed receivers in
their Motion for Reconsideration (Docs. 39, 39-1); however, as discussed in this Order, the
Court disagrees.

1 *Canada Life*, 563 F.3d at 844 (internal quotation and citation omitted). But, the parties
2 bargained for precisely this remedy upon default when they entered into the loan
3 agreements. Moreover, Defendants have not suggested, nor can the Court conceive, of a
4 less drastic equitable remedy¹⁶ that would afford the same protection to HIP Lending's
5 interests. Therefore, the Court will grant HIP Lending's Motion for the Appointment of a
6 Receiver. Additionally, the Court finds that Mr. Pegnia is an appropriate receiver.
7 Accordingly,

8 **IT IS ORDERED** that HIP Lending's Motion for the Appointment of Receiver
9 (Doc. 4) is **GRANTED**.

10 **IT IS FURTHER ORDERED** that Defendants' Motion for Reconsideration
11 (Doc. 39) is **DENIED**.

12 **IT IS FINALLY ORDERED** as follows:

13 1. **Appointment of Receiver.** GlassRatner Advisory & Capital Group, LLC,
14 by and through Mr. Joseph Pegnia (the "Receiver"), is appointed Receiver over the
15 Collateral and Subsidiary LLCs (the "Receivership Estate"). The Court finds that the
16 Receiver possesses the necessary qualifications to act as receiver for the Receivership
17 Estate.

18 2. **Bond and Oath.** The Receiver's appointment is effective upon the Receiver
19 filing a bond with the Clerk of the Court in the amount of \$10,000.00 and taking the oath
20 required by law. The cost of the bond will be reimbursed to the Receiver by the
21 Receivership Estate. The Receiver may at any time file a motion requesting that the bond
22 be exonerated, or that it be discharged or released from its appointment as receiver, and all
23 of its responsibilities attendant thereto.
24

25
26 ¹⁶ Both parties have put forth proposed orders regarding the scope of the receivership.
27 (Docs. 4-3 & 39-2). Defendants' proposed order provides that the receiver "will occupy
28 an oversight position, rather than a hands-on intensive management role." (Doc. 39 at 8).
The Court finds that an "oversight position" would not be enough to accomplish the
purpose of the receivership. Moreover, as previously discussed, Defendants consented to
a managerial receivership in the Second Amended Loan Agreement.

1 3. **Powers and Duties.** The Receiver shall have exclusive possession and
2 control over the Receivership Estate with the power and authority to take possession,
3 preserve, protect, operate, manage, market, sell and transfer the Receivership Estate and/or
4 any parts or portions thereof. The Receiver shall be the agent of this Court and solely the
5 agent of this Court in acting as the Receiver under this Order. The Receiver shall be
6 accountable directly to this Court. The Receiver shall comply with all laws and Local
7 Rules of this Court governing federal receivers. The Receiver shall have other powers,
8 rights and duties of receivers appointed under federal law including, without limitation, the
9 following rights, powers and duties:

10 A. **Collection of Proceeds.** The Receiver shall have the power to take
11 all steps necessary to collect the Proceeds from the Receivership Estate and deposit said
12 sums into one or more accounts (“Bank Account”) at a federally insured bank. The
13 Receiver shall have the power to present for payment any checks, money orders, and other
14 forms of payment made payable to Defendants or Subsidiary LLCs, any property manager,
15 any affiliates of any of them, or such similar names, which constitute or are derived from
16 the Proceeds of the Receivership Estate, endorse same and collect the proceeds thereof,
17 such proceeds to be used and maintained as elsewhere provided herein. The Receiver shall
18 have the sole and exclusive authority to disburse funds from the Bank Account. The
19 Receiver shall have authority to take possession of bank and other deposit accounts of
20 Defendants or Subsidiary LLCs, any property manager or any affiliates of any of them
21 related to the Receivership Estate, including such accounts that may not be in Defendants’
22 or Subsidiary LLCs’ name, or that may be in the name of one or more management
23 companies, and to open, transfer and change all bank and trade accounts relating to the
24 Receivership Estate, so that all such accounts are in the name of the Receiver.

25 B. **Possession of Receivership Estate.** The Receiver shall have the
26 exclusive right to take and keep possession of the Receivership Estate, including, without
27 limitation, all bank accounts, security deposits, and deposit accounts during the pendency
28

1 of the receivership and/or the above-captioned action. The Receiver is authorized to
2 engage a lock smith or similar professional for the purposes of gaining access and taking
3 possession of any asset of the Receivership Estate.

4 C. **Management of Receivership Estate.** The Receiver shall manage
5 and operate the Receivership Estate on a daily basis in a manner consistent with this Order.
6 The Receiver shall have the power and authority to enforce agreements and enter into new
7 agreements and contracts relating to the Receivership Estate. The Receiver shall manage,
8 operate and maintain the Receivership Estate subject to such rules and conditions as the
9 Receiver may establish to ensure that Profits are profitably preserved and used, and to
10 reasonably ensure that the value of the Receivership Estate is not materially diminished.
11 The Receiver shall make the following daily operating decisions regarding the
12 Receivership Estate, including, without limitation:

13 1) Hire outside advisors for the Receivership Estate to conduct
14 the operations of the Receivership Estate as directed by Receiver, and terminating
15 the employment of existing advisors, officers, or employees of the Receivership
16 Estate, in its discretion;

17 2) Providing maintenance, repair, and improvement services for
18 the Receivership Estate and extraordinary maintenance or repair services where
19 deemed appropriate in connection with emergency conditions; provided, however,
20 that the Receiver shall not contract for extraordinary maintenance or repair services
21 costing \$5,000 or more without approval of the Court;

22 3) Terminating or continuing in effect in Receiver's business
23 judgment any contracts or leases presently existing relating to the Receivership
24 Estate;

25 4) Entering into or modifying contracts affecting any part or all
26 of the Receivership Estate, including, without limitation, any leases affecting the
27 Receivership Estate, so long as, for all contracts costing or having a value of more
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1 than \$10,000 annually, or for any leases or contracts having a term of more than 30
2 days, the Receiver first obtains the written consent of the Court; and

3 5) Procuring goods and services for the Receivership Estate.

4 D. **Sale or Liquidation.** The Receiver may hire brokers for the
5 Receivership Estate as the Receiver deems appropriate to assist with listing and marketing
6 the Receivership Estate for sale. The Receiver, with Court approval, may sell the
7 Receivership Estate, in part or in whole, free and clear of liens, claims, encumbrances, and
8 interests. If the Receiver decides to proceed with a sale of some or all of the Receivership
9 Estate, the Receiver or Plaintiff shall file a Motion to Approve a sale and any party shall
10 have fourteen (14) days to file an objection with this Court. If no timely objection is filed,
11 then the Receiver or Plaintiff shall file a Notice of No Objection and the Motion will be
12 considered fully briefed at that time. If a timely objection is received, the Court will at that
13 time determine whether it needs to set a hearing on the Motion and Objection.

14 E. **Payment of Expenses.** To the extent reasonably possible given the
15 income generated by the Receivership Estate, the Receiver shall pay the current operating
16 expenses of the Receivership Estate in the ordinary course of business; provided, however,
17 that the Receiver shall not pay operating expenses or other payables relating to periods
18 prior to Receiver's appointment as the Receiver unless, in Receiver's discretion, the same
19 is necessary or desirable for the current and future operation and management of the
20 Receivership Estate. The Receiver shall also disburse funds from the Bank Account to pay
21 all amounts necessary to maintain adequate all risk hazard property damage and all risk
22 comprehensive liability insurance on the Receivership Estate, to the extent necessary to
23 ensure the Receivership Estate is insured (nothing herein shall be deemed to absolve
24 Defendants of their obligations under the Loan Documents in place between Plaintiff and
25 Defendants). Subject to the provisions of this Order, payment of payroll, payroll taxes,
26 employee benefits, leasing company fees, property management company fees, as
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1 applicable, utilities, insurance, taxes, landscaping, janitorial services, and maintenance and
2 other ordinary course expenses shall not require prior approval of the Court.

3 F. **Accounting Records.** Defendants shall cause to be provided, on
4 reasonable notice and during normal operating hours, and the Receiver shall expeditiously
5 review and inspect the accounting records with respect to the Receivership Estate, and shall
6 take such steps as it deems necessary to assure that all Profits collected and all the
7 disbursements made in connection with the Receivership Estate by the Receiver are
8 properly accounted for in accordance with generally accepted accounting principles.

9 G. **No Obligation to Complete Tax Returns.** Notwithstanding any
10 other provision hereof, the Receiver shall be under no obligation to complete or file tax
11 returns on behalf of Defendants or Subsidiary LLCs for income or other taxes. While
12 acting as receiver, the Receiver shall comply with applicable laws and regulations relating
13 to the collection of taxes. The Receiver shall allow Defendants or Subsidiary LLCs with
14 such access to books and records within the Receiver's custody or control as may be
15 necessary in order for Defendants or Subsidiary LLCs to complete and file tax returns on
16 their own behalf.

17 H. **No Appraisal Required.** The Receiver is excused from seeking an
18 independent professional appraisal of the Receivership Estate, but the Receiver is
19 authorized to commission appraisals at the Receiver's discretion.

20 I. **Standard of Care.** The Receiver shall at all times exercise reasonable
21 care in employing its business judgment to administer the Receivership Estate.

22 J. **Licenses and Permits.** The Receiver may acquire or renew all
23 governmental licenses, permits, or other authorizations, including any liquor license, either
24 in the Receiver's name or in the name of Defendants or Subsidiary LLCs, pertaining to the
25 Receivership Estate or any business associated therewith and do all other things necessary
26 or appropriate to maintain and protect the Receivership Estate.
27
28

1 K. **Budget and Actual-to-Budget Comparison Reports.** The Receiver
2 shall be permitted to use Advances and Proceeds only as set forth in and pursuant to a
3 Budget and this Order. All Advances and Proceeds shall be deposited into the Bank
4 Accounts as set forth above, which shall be disbursed by the Receiver pursuant to the
5 express items in the Budget. The Receiver shall prepare and submit to the parties and the
6 Court a detailed budget ("Budget") that sets forth all projected receipts together with a
7 weekly forecast of other revenues and expenses and available cash. Any party may file an
8 objection within seven (14) days, which must specifically identify the category or line item
9 that it is objecting to and propose an alternative amount. If no party files a timely objection,
10 the budget shall be deemed approved. On a weekly basis the Receiver shall prepare and
11 submit to the parties and the Court an actual-to-budget comparison report. The Budget may
12 be amended from time to time with prior Court approval.

13 L. **Borrowing Authority.** The Receiver is authorized to borrow from
14 Plaintiff, with Court approval, such amounts as may be necessary to satisfy the costs and
15 expenses of the receivership, to pay operating expenses and other expenses, to the extent
16 that the net Proceeds derived from the Receivership Estate are insufficient to satisfy such
17 costs and expenses ("Advances"). All borrowings from Plaintiff shall be added to the
18 principal as Advances under the Loan Documents between Plaintiff and Defendants and
19 shall be secured by the Loan Documents with the same priority as Plaintiff's existing liens
20 encumbering the Receivership Estate. The Advances shall be repaid by the Receiver to
21 Plaintiff as collection of Proceeds allow or from the proceeds of the sale of the assets of
22 the Receivership Estate.

23
24 4. **Administration.** The Receiver is authorized to employ the following
25 procedures and case administration:

26 A. **Bank Accounts.** The Receiver may establish the Bank Accounts
27 described above.
28

1 B. **Financial Reports.** Commencing sixty (60) days after the
2 appointment herein, and no later than the fifteenth (15th) day of each month thereafter, the
3 Receiver shall file with the Court and serve on the parties a complete report on its activities
4 and the condition of the Receivership Estate during the preceding calendar month,
5 including a complete accounting of Proceeds collected and the disbursements made during
6 the preceding calendar month (the "Report"). If the Receiver believes such Report would
7 contain sensitive financial information, disclosure of which will negatively impact the
8 Receivership Estate or the Receiver's ability to sell the Receivership Estate, the Receiver
9 may request, in compliance with Local Rule 5.6, to file the Report under seal.

10 C. **Fee.** The Receiver, including its staff professionals, shall be paid a
11 reasonable customary fee for its work as receiver based upon its normal hourly rates. The
12 Receiver shall file with the Court and serve on the parties' periodic requests for the
13 payment of such reasonable compensation, with the first such request filed no more than
14 sixty (60) days after the date of this Order. Any party shall have fourteen (14) days after
15 the Receiver files the request with the Court to object to the requested fees and costs. The
16 approved fees and costs of the Receiver and its professionals, including retained counsel,
17 shall be paid from the gross receipts derived from the Receivership Estate. If the assets are
18 not sufficient to pay the approved Receiver's fees as presented, Plaintiff may, with Court
19 approval, and without obligation to do so, advance funds to the Receiver sufficient to pay
20 such approved fees and costs, which funds shall constitute Advances under the Loan
21 Documents.
22

23 D. **Court Approval; Procedure.** Any motion by the Receiver for Court
24 approval or any act of the Receiver requiring Court approval shall be served on each party
25 hereto and each other person who has filed and served on the Receiver a request for special
26 notice. The Receiver may file requests for special notice on behalf of any party; however,
27 such request filed by the Receiver shall not be deemed consent to the jurisdiction of this
28

1 Court. In addition to service by mail or personal service, service may be made by facsimile
2 or e-mail.

3 E. **Notice.** In addition to any special notice provisions contained herein,
4 the Receiver shall provide notice of all pleadings filed by the Receiver herein to the parties
5 hereto. Unless otherwise provided by the Rules of Civil Procedure, such notice may be
6 made by mail or personal service five (5) days in advance of any hearing, by confirmed
7 facsimile five (5) days in advance of any hearing, or as otherwise may be approved by the
8 Court. The Receiver shall be deemed to have been provided adequate notice if it complies
9 with this section.

10 F. **Further Instructions.** The Receiver may at any time apply to this
11 Court for further or other instructions or for modification of this Order or for further powers
12 necessary to enable the Receiver to properly perform its duties, or for termination of the
13 Receiver's appointment.

14 5. **Other Parties' Obligations.** Defendants and Subsidiary LLCs and their
15 officers, directors, agents, representatives and employees, contractors, and subcontractors,
16 including without limitation any property management firm, company or individuals
17 retained by Defendants and Subsidiary LLCs and their employees, and all persons with
18 actual or constructive knowledge of this Order and their agents and employees, shall turn
19 over to the Receiver, within two (2) business days after presentation of this Order:
20

21 A. The possession of the Receivership Estate, including all keys to all
22 locks related to assets of the Receivership Estate, all bank accounts, deposit accounts,
23 security deposits, codes, access codes, security codes, passwords, and the records, books
24 of account, ledgers and all business records for the Receivership Estate (including, without
25 limitation, the plans, specifications and drawings relating to or pertaining to any part or all
26 of the Receivership Estate), wherever located and in whatever mode maintained (including,
27 without limitation, information contained on computers and any and all software relating
28 thereto as well as all banking records, statements, and cancelled checks);

1 B. All documents that constitute or pertain to licenses, permits or
2 governmental approvals relating to the Receivership Estate;

3 C. All documents that constitute or pertain to insurance policies, whether
4 currently in effect or lapsed, that relate to the Receivership Estate;

5 D. All leases and subleases, royalty agreements, licenses, assignments or
6 other agreements of any kind, whether currently in effect or lapsed, that relate to the
7 Receivership Estate;

8 E. All documents pertaining to past, present or future construction of any
9 type with respect to all or part of the Receivership Estate;

10 F. All documents pertaining to toxic chemicals or hazardous materials,
11 if any, ever brought, used and/or remaining upon the Collateral, including, without
12 limitation, all reports, surveys, inspections, checklists, proposals, orders, citations, fines,
13 warnings and notices;

14 G. All Proceeds derived from the Receivership Estate;

15 H. All books, records, including payroll records and personnel files, and
16 accounts relating to the Receivership Estate, and all other records, documents, insurance
17 policies and instruments of whatever kind and nature which relate to the operation and
18 control of any part of the Receivership Estate; and

19 I. All financial institutions, credit card processors, insurance agents or
20 underwriters, utility providers, vendors, suppliers, tradesmen, materialmen, service
21 providers, franchisors, taxing agencies, and all government agencies and departments are
22 hereby ordered to take direction from the Receiver as it relates to the accounts of
23 Defendants or Subsidiary LLCs and to surrender any and all funds held on deposit or apply
24 said funds as directed by the Receiver.

25 6. **Utilities.** Any utility company providing services to the Receivership Estate,
26 including gas, electricity, water, sewer, trash collection, telephone, communications or
27 similar services, shall be prohibited from discontinuing service to the Receivership Estate
28

1 based upon unpaid bills incurred by Defendants. Further, such utilities shall transfer any
2 deposits held by the utility to the exclusive control of the Receiver and be prohibited from
3 demanding that the Receiver deposit additional funds in advance to maintain or secure such
4 services.

5 7. **Mail.** The Receiver may issue demand upon the U. S. Postal Service that the
6 U.S. Postal Service grant exclusive possession and control of mail, including postal boxes,
7 as may have been used by Defendants or Subsidiary LLCs and may direct that certain mail
8 related to the Receivership Estate and its business be re-directed to the Receiver.

9 8. **Insurance.** The Receiver shall determine upon taking possession of the
10 Receivership Estate whether in the Receiver's judgment, there is sufficient insurance
11 coverage. With respect to any insurance coverage in existence or obtained, the Receiver
12 and the property management company, if one exists, shall be named as additional insureds
13 on the policies for the period of the Receivership. If sufficient insurance coverage does
14 not exist, the Receiver shall immediately notify the Court and shall have thirty (30)
15 calendar days to procure sufficient all-risk and liability insurance on the Receivership
16 Estate (excluding earthquake and flood insurance) provided, however, that if the Receiver
17 does not have sufficient funds to do so, the Receiver may seek an Advance from Plaintiff
18 and increase the coverage. The Receiver shall not be responsible for claims arising from
19 the lack of procurement or inability to obtain insurance. Defendants and Subsidiary LLCs
20 and their property managers, employees, agents, affiliates and insurer are prohibited from
21 cancelling, reducing, or modifying any and all insurance coverage in existence with respect
22 to the Receivership Estate that are in effect as of the date of this Order without the consent
23 of Receiver.
24

25 9. **Use of Funds.** The Receiver shall pay only those bills that are reasonable
26 and necessary for the operation or the protection of the Receivership Estate, according to
27 the Budget, and shall allocate funds in the following order of priority: (1) the costs and
28 expense of the Receivership Estate including utilities, insurance premiums, general and

1 special taxes or assessments levied on the real property and improvements thereon,
2 receivership fees, professional fees, attorneys' fees, etc.; (2) the creation and retention by
3 the Receiver of a reasonable working capital fund, according to the Budget; and (3)
4 amounts due to Plaintiff.

5 10. **General Provisions**

6 A. **Civil Claims.** No person or entity shall file suit against the Receiver,
7 or take other action against the Receiver, without an Order of this Court permitting a suit
8 or action to proceed; provided, however, that no prior Court Order is required to file a
9 motion in this action to enforce the provisions of this Order or any other Order of this Court
10 in this action.

11 B. **Personal Liability to Creditors.** The Receiver and its employees,
12 agents, accountants and attorneys shall have no personal liability in connection with any
13 liabilities, obligations, liens or amounts owed to any of the parties and any of Defendants'
14 creditors because of its duties as Receiver. Nothing in this Order shall grant any rights to
15 trade creditors or general unsecured creditors, whose rights shall be solely determined in
16 accordance with federal law.

17 C. **No Personal Obligation of Receiver.** No obligation incurred by the
18 Receiver in the good faith performance of its duties in accordance with the orders of this
19 Court, whether pursuant to any contract, by reason of any tort, or otherwise, shall be
20 Receiver's obligation or the personal obligation of its principals or agents. Rather, the
21 recourse of any person or entity to whom the Receiver becomes obligated in connection
22 with the performance of its duties and responsibilities shall be solely against the
23 Receivership Estate. The Receiver shall have no obligation to advance its own funds to
24 any costs and expenses of the Receivership Estate and the Receiver shall not be liable for
25 any Receivership Estate or receivership obligations. The Receiver is authorized to use
26 Defendants' or Subsidiary LLCs' taxpayer identification numbers to establish and open
27 bank accounts, issue financial reports, open, administer or close accounts with vendors or
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1 utilities suppliers, with respect to marketing or sale of the Receivership Estate or any loans
2 relating thereto, and for other accounting and financial related purposes. The Receivership
3 Estate shall indemnify and hold harmless the Receiver and its principals and agents from
4 any claims against the Receiver which arise out of the Receiver's operation of this
5 Receivership in a manner consistent with and within the scope of this Order, unless the
6 Receiver has committed fraud and gross negligence in the administration of its duties. The
7 Receiver and its principal and agents shall not be liable for any action or omission of
8 Plaintiff or any Defendant.

9 11. **No Lender Liability and No Limit on Lender Remedies.** Plaintiff and its
10 present and former officers, directors, shareholders, employees and agents, subsidiaries,
11 and their heirs, personal representatives, successors and assigns shall not be liable for:
12 (i) any action or omission of the Receiver, or (ii) defects, deficiencies, flaws, expenses,
13 costs or other matters relating to the Receivership Estate. Nothing in this Order shall be
14 deemed to limit or prohibit Plaintiff from initiating and/or completing a uniform
15 commercial code sale or other disposition of the Receivership Estate or from negotiating
16 and completing an acceptance of collateral.

17 12. **Non-Interference with Receiver.** All creditors of Defendants, all persons or
18 entities with actual knowledge of this Order, including, without limitation, the parties to
19 this action, and the officers, directors, members, principals, affiliates, agents, servants and
20 employees (current or former) of Defendants or Subsidiary LLCs, are enjoined from:

21 (a) Interfering with the Receiver, directly or indirectly, in the
22 management and operation of the Receivership Estate or business operations of Defendants
23 or Subsidiary LLCs;

24 (b) Interfering with the Receiver, directly or indirectly, in the collection
25 of revenues derived from the Receivership Estate or the business operations of Defendants
26 or Subsidiary LLCs;
27
28

1 (c) Collecting or attempting to collect from the Receivership Estate or
2 Defendants or Subsidiary LLCs;

3 (d) Extending, dispersing, transferring, assigning, selling, conveying,
4 devising, pledging, mortgaging, creating a security interest in or disposing of the whole or
5 any part of the Receivership Estate without the prior written consent of the Receiver and
6 this Court;

7 (e) Terminating any agreement with Defendants or Subsidiary LLCs
8 without prior Court approval; and

9 (f) Any act which directly or indirectly interferes in any manner with the
10 discharge of the Receiver's duties under this Order and the operation and management of
11 the Receivership Estate, Defendants' or Subsidiary LLCs' business.

12 13. **Termination.** The Receiver or any party may request the Receivership be
13 terminated upon the full payoff of Plaintiff's Indebtedness secured by the Loan Documents,
14 upon the completion of a valid foreclosure of the Receivership Estate, or upon the
15 acquisition of the Receivership Estate by Plaintiff or any assignee in satisfaction of the
16 indebtedness, or if the Receivership is otherwise no longer necessary. Upon termination of
17 the Receivership, the Receiver shall relinquish possession and control of the Receivership
18 Estate to the appropriate party. Upon relinquishing possession and control of the
19 Receivership Estate, the Receiver shall be relieved from all further duties, liabilities and
20 responsibilities relating to the Receivership Estate and shall thereafter submit the
21 Receiver's final account and report for Court approval and discharge.

22 Dated this 1st day of June, 2020.

23
24
25
26 I hereby attest and certify on 6/16/2020
27 that the foregoing document is a full, true and correct
28 copy of the original on file in my office and in my cus-
tody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

By [Signature] Deputy

[Signature]
Honorable Diane J. Humetewa
United States District Judge